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EQUITY ACTS IN PERSONAM

MAXIMS IN GENERAL

Maxims are to be found among all peoples in certain stages of their culture, and are familiar phenomena in all systems of jurisprudence. Legal maxims are the proverbs of the law.[1]

Popular proverbial sayings, which are the traditional versions of the orally expressed reflections of individuals gifted with more than ordinary power of observation, homely wit, and trenchant tongue, furnish the model for literary proverbs or gnomes, which are the product of conscious reflection and cast the popular saying into a literary and sometimes a poetical form; and these in turn furnish the model for legal maxims.[2]

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[1]"Maxims are the condensed good sense of nations." Brown, Legal Maxims. "They are as so many oracles of jurisprudence." D'Aguesseau, Oeuvres, Vol. 1, p. 279.

[2]Salmond Jurisprudence, 6th. ed., p. 475; Pound, Maxims of Equity, 34 Har. Law Rev. p. 809.

Maxims played an important part in the Roman and later civil law, in the Germanic and French law, and in the canon law. In the English law, during the Anglo-Saxon period, there were popular legal proverbs. After the conquest, the development of the common law through the King's courts put an end to the evolution of popular legal proverbs, and gave rise to the professional legal maxim.[3] These maxims of the common law were for the most part, either inherited or borrowed from the Roman or civil law, or framed during the formative period of the common law by medieval jurists "juxta exemplum Romanorum."[4]

MAXIMS OF THE COMMON LAW

The so-called maxims of the common law were regarded with an almost superstitious reverence.[5] "A maxim," said Lord Coke, "is a proposition to be of all men confessed and granted without proof, argument or discourse xxxa sure foundation or ground of art and a conclusion xxx so sure and uncontrollable as that they ought not to be questioned.[6]" It is therefore not uncommon to find decisions in important cases in which the judges give practically no reason for their decision except the quotation, without comment, of a maxim which is evidently regarded by the court as affording by its terms a satisfactory ratio decidendi.

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[3]Pound, Maxims of Equity, 34 Har. Law Rev. p. 809.

[4]Salmond, Jurisprudence, 6th. ed., p. 475.

[5]The writers sometimes use the term maxim as a synonym of rule; sometimes as a synonym of principle; and sometimes as having a meaning intermediate between rule and principle.

[6]Co. Litt. p. 67a; Co. Litt., p. 10b, 11a. "Maxims are the foundations of the law and the conclusions of reason and therefore they ought not to be impugned but always to be admitted." Sergeant Morgan, arguendo in Colthurst v. Bejushier, 1 Plowd. 27.

A more critical application of analytical, philosophical and historical methods to the solution of legal problems has caused a decline in the importance of legal maxims. It is now realized that legal maxims are not all of equal value; that some ought to be amended; that some ought to be discarded; that even the best are merely maxims and not digests or treatises; that the truth of them all should be tested from time to time by careful analysis; and that in most cases they are merely sign posts pointing to the right road and not the road itself.[7] In modern law, it has been said, maxims "play the part of the needle with respect to the pole. They do nothing but point,"[8] and, as in the case of the needle, there is much deviation and many things may serve to deflect.[9]

A learned writer has therefore well said: "It seems to me that legal maxims are little more than pert headings of chapters. They are minims rather than maxims, for they give not a particularly great, but a particularly small amount of learning. As often as not, the exceptions and qualifications to them are more important than the so-called rules."[10]

EQUITY ACTS IN PERSONAM

In spite, however, of the general decadence of the jurisprudence of maxims, the importance of the maxim, "Equity acts in personam and not in rem," is still vigorously and variously asserted.

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[7]Smith, The use of Maxims in Jurisprudence, 9 Har. Law Rev. p. 13.

[8]Fabrequettes, Logique Judicaire et L'Art DeJuger, p. 194.

[9]Pound, Maxims of Equity, 34 Har. Law Rev., p. 809.

[10]Stephens, History of Criminal Law, vol. 2, p. 94. "They express general principles without the necessary qualifications and exceptions and are therefore much too absolute to be taken as trustworthy guides to the law." Salmond, Jurisprudence, 6th. ed., p. 475.

"The principle Equity acts upon the person, is and always has been the key to the mastery of equity," says a learned writer.[11] This maxim has been declared to be "the fundamental difference between law and equity;"[12] "an absolute limitation upon equity jurisdiction,"[13] "a basic principle of equity jurisdiction whose influence affects the entire exercise of equity jurisdiction."[14]

This maxim has frequently been stated by the courts as the reason for their decisions in important cases. "Equity can do this," they say, "because it acts in personam." "Equity cannot do that because it acts in personam."[15]

The fact that such important consequences are attributed to this maxim would naturally cause one to believe that it had been clearly understood, carefully analyzed and perspicuously exposited. But such is not the case. An examination of the text books on equity and the decisions of the courts fails to disclose that this principle has been subjected to careful analysis and definition. It seems in many cases, to be a mere solving phrase—a stereotyped form for gliding over a difficulty without explaining it.

"It is one of the misfortunes of the law," says Justice Holmes, "that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[16] This is especially true when the phrases are Latin phrases. Lord Bacon once said that the Latin language

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[11]Ames, Origin of Uses, Lectures on Legal History, p. 232.

[12]Ames, Law and Morals, Lectures on Legal History, p. 444.

[13]Langdell, Brief Survey of Equity Jurisdiction, p. 6.

[14]Schnaltz vs. York Brewing Co., 204 Pa. 1.

[15]Cook, The Powers of Equity, 15 Col. Law Rev., p. 37; Schnaltz vs. York Brewing Co., 204 Pa. 1; Erdner vs. Erdner, 234 Pa. 500.

[16]Hyde vs. U. S., 225 U. S. 391.

was the "briefest to contrive rules compendiously, the aptest for memory, and of the greatest authority and majesty to be vouched and alleged in argument,"[17] and certainly a phrase couched in Latin seems to some persons to be invested with "a kind of mysterious halo." A learned judge was quite right when he said, "There is nothing of mystery or sanctity in the words of a dead language". But certainly the use of the Latin phrases, in personam and in rem, in the maxim under discussion has had the effect of rendering its meaning uncertain and obscure.[18]

IN PERSONAM AND IN REM

The antithetical pair of expressions, in personam and in rem, are employed to classify among other things; (1) rights; (2) jurisdiction; (3) actions or suits; (4) judgments or decrees; (5) executions. It is usually assumed by authors, lawyers and judges, with unfortunate effects on their reasoning and argument, that these phrases have the same meaning in each of the five cases mentioned, and therefore represent in each case a precisely similar basis of classification. The identity of terms seems, by a principle of "linguistic contamination," to express an identity between the ideas which are expressed by them. The exact opposite is true. The meanings of the expressions are not the same in the different classifications.[19]

"As our law develops it becomes more and more important to give definiteness to its phraseology; discriminations multiply, new situations and complications of fact arise, and the old outfit of ideas, discriminations, and phrases has to be carefully revised. Law is not so unlike all other subjects of human contemplation that

[17]Preface, Bacon's Maxims.

[18]Clark, Equity, p. 8.

[19]Hohfield, Fundamental Legal Conceptions, p. 67.

clearness of thought will not help us powerfully in grasping it. If terms in common legal use are used exactly, it is well to know it, if they are used inexactly, it is well to know that, and to remark just how they are used."[20] It may therefore prove beneficial to discuss the meanings of the phrases, in personam and in rem, as used in each of the classifications, in order that we may discover to which of these classifications the maxim, "Equity acts in personam and not in rem," has reference.

RIGHTS

The term right is a much abused word, and is therefore "a constant temptation to fallacy." It is used with various connotations.[21] It is sometimes used in a generic sense to describe any benefit or advantage conferred upon a person by a rule of law. "The term right in civil society is defined to mean that which a man is entitled to have, or to do, or to receive from others, within the limits prescribed by law."[22]

In its strict and proper sense, a legal right is an interest recognized and protected by a rule of law, the violation of which would be a legal wrong to him whose interest it is, and respect for which is a legal duty.[23] It is the correllative of legal duty. "A duty or legal obligation is that which one ought or ought not to do. Duty and rght are correlative terms. When a right is invaded, a duty is violated."[24] "When we say that A has a certain right against B, we mean, at the same time, that the law regards B as under correllative duty. For example, if

[20]Thayer, Preliminary Treatise on Evidence, p. 190.

[21]"The word 'right' is used in so many different senses that it has lost all possiblity of accurate significance." Foulke, Philosophy of Law, p. 37. See also Terry, Leading Principles of Anglo-American Law, sec. 113-129.

[22]Atchinson & Neb. R. Co. v. Baty, 6 Neb. 40.

[23]Salmond, Jurisprudence, 6th ed., p. 182.

[24]Lake Shore & M. S. R. vs. Kurtz, 10 Ind. App. 60.

A has a right that B shall not assault him, B, we say, is under correllative duty not to assault him. Both statements mean in the last analysis, that if B does (or in other cases, fails to do) a certain act or acts, A can bring an action, in the appropriate tribunal, and obtain some kind of a judgment or decree against B."[26]

Rights, in this definite and appropriate sense, are classified, according to their incidence, into rights in personam and rights in rem.[27] A right in personam is one which is available against a particular person or persons. A right in rem is one which is available against persons generally.[28]

"The distinction is one of great importance in the law, and we may take the following illustrations of it. My right to the peaceable enjoyment of my farm is a real right, for all the world is under a duty toward me not to interfere with it. But if I grant a lease of the farm to a tenant, my right to receive rent from him is personal, for it avails exclusively against the tenant himself. For the same reason my right to the possession and use of the money in my purse, is real; but my right to receive money from some one who owes me is personal. I have a real right against everyone not to be deprived of my liberty or reputation. I have a personal right to receive accommodations at an inn."[29]

It is important to observe that a right in rem is not a right "against a thing." There is judicial authority to the effect that the "somewhat obscure and ambiguous

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[26]Cook, The Powers of Equity, 15 Col. Law Rev., p. 37.

[27]Austin, Jurisprudence, 5th. ed., p. 370; Holland Jurisprudence, 10th. ed., p. 139; Salmond, Jurisprudence, 6th. ed., p. 202.

[28]Pound, Outlines of the Common Law, p. 28; and authorities cited in preceding note.

[29]Salmond, Jurisprudence, 6th. ed. 202. The learned author uses the terms real and personal as synonymous with in rem and in personam. Such usage though common is erroneous. Hohfield, Fundamental Legal Conceptions, p. 90.

expression 'jus in rem,' when standing by itself, catches a borrowed clearness from the expression 'jus in personam' to which it is opposed;"[30] and it is certain that any person who has not examined the question is apt to translate "right in personam" as meaning "right against a person," and then to assume that "right in rem," means "right against a thing." This assumption is encouraged by the literal translation of the expression "right in personam." But this alleged "borrowed clearness" is in reality obscurity and confusion. Rights in rem are rights against persons and not rights against things. "All xxx rights are really against persons. Whether they are xxx rights in rem depends upon the number of persons affected."[31]

It is also necessary to observe that a right in rem is not always one relating to or concerning a thing i. e., a tangible object. The term includes:

(1) Rights relating to a definite tangible object, e. g., a landowner's right that others shall not enter on his land.

(2) Rights relating neither to a definite tangible object nor person, e. g., a patentee's right that others shall not infringe his patent.

(3) Rights relating to the holder's own person, e. g., one's right that others shall not assault him.

(4) Rights relating to another person, e. g., a father's right that his daughter shall not be seduced.[32]

A right does not cease to be a right in rem and become a right in personam merely because it is not available against everyone in the jurisdiction. "The essence of a right in rem is not that it is good against the whole world xxx. It is sufficient if it is good generally against an indefinite number, as distinguished from those

[30]Hoof v. Hoffman, 16 Ariz. 555.

[31]Tyler v. Commissioners, 175 Mass. 76, per Holmes. See Hohfield, Fundamental Legal Conceptions, p. 75.

[32]Pound, Outlines of the Common Law, p. 29; Hohfield, Fundamental Legal Conceptions, p. 85; Library Am. Law, Vol. 1. p. 23.

available only against specific persons."[33] Thus the rights in rem of a property owner not to have his property trespassed upon may be subject to the power of eminent domain exercised by the state.[34]

The defects of the common law which gave rise to equity have been classified as follows: (1) The failure of the common law to recognize a substantive right; (2) the inadequacy of the relief afforded by the common law to protect a right; (3) the inadequacy of the procedure at common law to establish a right.[35]

In the second class of cases, in which equity interfered to give more adequate protection to rights recognized by the common law, many of the common law rights thus more adequately vindicated by equity are rights in rem. The whole jurisidction of equity to give relief against common law torts prove this, for most torts are violations of rights in rem.[36]

It has been contended, however, that in the first class of cases, in which equity interfered because of the failure of the common law to recognize a substantive right (i. e., in which equity creates rights) the rights thus created by equity are necessarily rights in personam, "Equity," says a learned writer, "could not create a right in rem if it would, and would not, if it could."[37] "The most important consequence for present purposes," says another author," of this English judicial rendering of the Latin formula, Acquitas agit in personam, was this: Whenever the chancellor created and enforced a new right, i. e., an equity not recognized by the common law courts,

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[33]Huston, Enforcement of Decrees in Equity, p. 126; Maitland, Equity, p. 142. A contrary view has been asserted. Langdell, 1 Har. Law Rev. p. 60.

[34]Huston, Enforcement of Decrees on Equity.

[35]Story, Eq. Jur. Vol. 1, p. 26; 21 C. J. 70.

[36]Samond, Jurisprudence, 6th. ed. p. 431.

[37]Langdell, 1 Har. Law Rev. 60.

the right had to be a right in personam."[38] It is submitted, however, that many, though by no means at all, of the so-called equitable rights are rights in rem. "The trend both of juristic discussion and of the decisions moves toward a recognition that certain equitable rights are genuine rights in rem."[39]

From the foregoing discussion it sufficiently appears that the maxim, Equity acts in personam, has no reference to rights. Equity protects and vindicates many rights in rem.

JURISDICTION

Jurisdiction, in its proper sense means the power of a court to take action which will be binding upon the parties until set aside or reversed by some competent tribunal.[40] In many equity cases, however, the term is used to indicate the right of the plaintiff to obtain relief; and the statement that the equity courts "have no jurisdiction" merely means that equitable relief will not be granted because not warranted by the rules of equity.[41]

In the first and proper sense, jurisdiction means the power to decide whether relief will be granted. In the second sense, it means the right of the plaintiff to obtain relief.[42] In a case containing a good discussion of this distinction, the court said: "Equity jurisdiction may exist over a case although it is one which the settled doctrines of equity jurisprudence forbid any relief to be given x x x

[38]Schofield, 5 Ill. Law Rev., p. 19.

[39]Huston, Enforcement of Decrees in Equity, p. 87. For an attempt to enumerate equitable rights which have become rights in rem, see 1 Pom. Eq. Jur. sec. 146-149, 977.

[40]Cook, Powers of Equity, 15 Col. Law Rev. 106; Shipman C. L. Pleading, 3rd. ed., p. 16; Robinson, American Jurisprudence, p. 206. "The most approved definition of the word is that it is the power to hear and determine." 1 M. A. L., p. 197.

[41]See Cook, Cases on Equity, Vol. 1., p. 370 et seq.

[42]Pom. Eq. sec. 129-131.

yet equity jurisdiction is constantly confounded with the right of the plaintiff to maintain his suit and obtain his equitable relief, thus in part making the power to decide whether equitable relief shall be granted depend upon the actual granting of some relief."[43]

Jurisdiction, in the proper sense, is classified as in personam and in rem. A court is said to have jurisdiction in personam when the defendant has been personally served with notice of the action or suit within certain prescribed territorial limits (the territorial limits of the court's jurisdiction) or has voluntarily appeared.[44] A court is said to have jurisdiction in rem if the res in controversy is within the territorial limits of the court's jurisdiction, and notice of the suit has been given by publication.[45]

Originally courts of equity could give relief only if they had jurisdiction in personam. "In absence of statute the jurisdiction of equity is purely personal. Jurisdiction in rem or quasi in rem is the creature of statutes which are strictly construed."[46] It has sometimes been stated that the fact that, in absence of statute, courts of equity do not act unless they have acquired jurisdiction in personam, distinguishes courts of equity from courts of law, but this is not true. The power to act upon jurisdiction in rem is very largely, if not wholly, the creation of modern statutory law, for it seems equally unknown in common law actions. Logically there was no necessity for the failure of either court to develop the power to act upon juris-

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[43]P. v. McKane 28 N. Y. S. 981. In Hunt v. Hunt, 72 N. Y. 217, it is said, "Jurisdiction of the subject matter does not depend upon the ultimate existence of a good cause of action."

[44]15 C. J. 786; Shipman, C. L. Pleading, p. 21; 7. R. C. L. Sec. 69; Minor, Conflict of Laws, p. 184. Some courts hold that substituted service is sufficient in case of residents.

[45]Shipman, C. L. Pleading, p. 23; 15 C. J. 794; 7 R. C. L. Sec. 74; Minor, Conflict of Laws, p. 184. A reasonable method of imparting notice must be provided, 21 C. J. 150.

[46] 21 C. J. 150; Hart v. Sansom, 110 U. S. 151.

diction in rem. "Simply as a matter of history neither court seems to have developed the ability to do this."[47]

Adherence to the historical theory that equity can act only where it has jurisdiction in personam has frequently caused a delay of justice and an increase of its cost and not infrequently a denial of justice. In some exceptional cases, therefore, courts of equity have, without statutory authority, acted upon jurisdiction in rem;[48] and in practically all jurisdictions statutes have been passed, authorizing courts of equity to act in certain cases upon jurisdiction in rem.[49]

The maxim "Equity acts in personam," has therefore, as applied to jurisdiction, ceased to be wholly true.

ACTIONS AND SUITS

Actions and suits are commonly classified, according to the principal object sought to be accomplished by them, as in rem and in personam.[50] An action in personam is one whose principal purpose is to impose some responsibility or liability upon the defendant personally. Criminal prosecutors, suits to compel a defendant to perform a specific act, and actions to fasten a general pecuniary liability upon him are said to be of this character.[51] An action in rem is one whose principal purpose is to deprive the defendant of his interest in a particular thing. Common law actions for partition, proceedings for the condemnatiion of property under the power of eminent domain, and proceed-

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[47]Cook, Powers of Equity, 15 Col. L. Rev. 132.

[48]Stevenson v. Anderson, 2 Ves. & B., 407; Rourke v. McLaughlin, 38 Cal. 191; Wait v. Kern River Co., 157 Cal. 16; Clark, Equity p. 563.

[49]The Pennsylvania student should read the act of April 6, 1859, P. L. 387; and the act of May 17, 1921, P. L. 899.

[50]The classifications of jurisdiction, actions and decrees herein discussed are closely associated.

[51]Minor, Conflict of Laws, p. 184.

ings to enforce mechanics' liens are illustrations of actions in rem.[52]

This classification of actions depends upon their principal object (the assertion against the defendant of a general personal liability or of a liability to lose a particular thing) and not upon the ultimate result of the action. Thus, if A, trespasses upon B's land, B may sue A in an action of trespass for damages and secure a judgment that he recover from A a certain amount of money. An execution may be issued upon this judgment and particular property of A may be levied upon and sold. Nevertheless neither the action brought to secure such a judgment nor the judgment itself is said to be in rem. On the contrary both the action and the judgment are said to be in personam.[53]

An action in rem usually has as defendants a definite person or persons, and they alone are bound by the judgment and proceedings under it. An action in rem may, however, as in admiralty cases, bar "the whole world," and by some writers the term "action in rem" is applied only to these actions in which the interest of the "whole world" in the thing are adjudicated.[54] Actions in which the interests of particular persons only in a thing are adjudicated, are by these writers designated as actions quasi in rem.[55] The former are essentially anonymous proceedings aimed to reach the interest of the true owner or owners of the property whoever they may be. The latter, on the other hand, are aimed to reach only the interest of a named party. Neither sort of action, however, aims to en-

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[52]Minor, Conflict of Laws, p. 184; Cook, Powers of Equity, 15 C. L. R. 47.

[53]Hohfield, Fundamental Legal Conceptions, p. 109; Tyler vs. Court of Registration, 175 Mass. 76.

[54]See Clark, Equity, p. 8.

[55]Hook vs. Hoffman, 16 Ariz. 540; Beale, Cases on Conflict of Laws, p. 538.

force a personal liability upon the defendant, and neither therefore, is an action in personam; and the better usage classifies both as actions in rem.

There is no necessary relation between the character of the right which is sought to be enforced and the character of the action by which it may be enforced. A right in personam, e. g., A's right that B pay him $1,000, may be enforced in some cases, by a proceeding in rem, e. g., an attachment proceeding. A right in rem may be vindicated by action in personam, e. g., A's right that others shall not trespass upon his farm may be vindicated by an action of trespass against those who trespass.[56]

The object of an action in rem may be accomplished in two ways: (1) The judgment or decree may carry out the object directly, i. e., the effect of the judgment or decree itself may be to alter the property interest of the defendant in the desired manner, as e. g., the judgment in a common law action of partition;[57] (2) the object of the action may be accomplished only by what is done under the judgment or decree by the officers of the court, as, e. g., the foreclosure of a mortgage by a sale. In either case, sooner or later, entirely without the cooperation of the defendant, the desired alteration of his property interest takes place because of judicial proceedings.[58] If, although the principal object of the action remains the same, this object can be accomplished only by ordering the defendant to do an act, e. g., to execute a deed, the action, though in form in personam, is in substance in rem, and should be so considered.

It is usually stated that all suits in equity are proceedings in personam,[59], but this is not true. An examination of the proceedings in a suit for specific performance will

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[56]Hohfield, Fundamental Legal Conceptions, p. 110.
[57]Landell, Summary Eq. Pl., p. 36.
[58]Cook, Powers of Equity, 15 Col. L. R. 50.
[59]Clark, Equity, p. 9.

disclose that it is in reality a proceeding in rem. The suit is commonly thought of as brought to enforce a personal duty to convey, but a consideration of what is actually done in such a suit suggests a different view. The principal object of the suit is to deprive the defendant of his interest in a particular thing. The decree, in absence of statute, is, because of historical reasons, in form in personam—a personal order directed to defendant commanding the performance of an act; but the procedure by which this order may be enforced is partly in personam by imprisonment and partly in rem by the writs of assistance and sequestration. Moreover there are at present statutes in nearly every jurisdiction giving courts of equity power to pass legal title to property either directly by the decree of the court or indirectly by a deed executed by some person appointed by the court. Clearly under such statutes a suit in equity for specific performance against the vendor has become a proceeding in rem both as to its object and as to the effect of the decree and proceedings under it.[60] The same thing may be said of other suits in equity, e. g., suits for partition, suits to remove trustees and suits for the strict foreclosure of mortgages.

The maxim, "Equity acts in personam and not in rem, has therefore ceased to be wholly true as applied to the classification of actions.

[60]Cook, Powers of Equity, 15 Col. L. R. 127; Hollander vs. Central, etc., Co., 109 Md. 131.

(TO BE CONTINUED)

MOOT COURT

HINES VS. HILDRETH

Breach of Contract—Delivery of Goods—Place of Delivery—Sales—Section 43, Sales Act of 1915—Default of Delivery

STATEMENT OF FACTS

Hines, a grocer, obtained a contract with Hildreth, who dealt in fruits, to furnish him four bushels of apples of a specified kind every week for a period of two months. Nothing was said as to the place of delivery. The first three parcels were taken by the plaintiff from the defendant's place of business. He did not call for any more until the two months had elapsed. Hildreth then refused to deliver any except at a higher than the contract rate. Hines contended that the defendant was in default in not having delivered the apples at Hines' place of business, which was four blocks distant from Hildreth's. The court adopted Hine's view and allowed recovery of damages for failure to deliver the apples. Appeal.

Dilley, for Plaintiff.

Clark, for Defendant.

OPINION OF THE COURT

Barr, J. This is an action of assumpsit brought by the plaintiff, against the defendant to recover damages for an alleged breach of contract. The plaintiff contends that it was the duty of the defendant to deliver the apples to his (plaintiff's) place of business and not having done so, he (defendant) was in fault.

Since the contract was silent as to the place of delivery, resort must be taken to section 43 of the Sales Act of 1915, P. L. 554, to supply the omission. It is stated in that section as follows: "Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract express or implied, between the parties. Apart from any such contract express or implied, or usage of trade to the contrary the place of delivery is the seller's place of business if he has one, and if not, his residence."

As it is neither expressed in the contract and as there are no facts that sufficiently raise any implication, and as no usage to the contrary was alleged or shown, the place of delivery must be considered the seller's place of business. It was then the duty of the

plaintiff to take possession of the apples at the defendant's place of business. Nor can we see how the plaintiff could have interpreted the terms of the contract as to the place of delivery differently. That he must have known where the place of delivery was, is amply shown by the fact that he called at the defendant's place of business for the first three parcels.

This has always been the law in Pennsylvania previous to the enactment of the Sales Act, Hamilton vs. Calhoun, 2 Watts 139; Perlman vs. Sartorious, 162 Pa. 320-323. In the latter case it was said by the court: "If no place be designated by the contract—the general rule is that the articles sold are to be delivered at the place where they are at the time of the sale." And in the case of Sussman Brothers vs. Meier, 80 Super. 78, the facts of which are similar to the facts of the case at bar was decided to be declaratory of the law, previous to the Sales Act.

It is the judgment of this court, that the place of delivery was the defendant's place of business and his failure to deliver any of the apples to the plaintiff's place of business did not constitute a breach of the contract.

The lower court in adopting the view converse to the one just announced erred. And the judgment of that court is therefore reversed.

OPINION OF SUPREME COURT

Nothing was said in the contract as to the place of delivery of the apples. The practice or usage under this contract, for three weeks, was that the plaintiff, the vendee, called for the apples at the vendor's place of business. The Sales Act designates the vendor's place of business, as that of delivery. By failing to call for the apples, after the third week, the vendee ended any liability of the vendor under the contract. After the expiration of the eight weeks, the prices of apples having risen, apparently the vendee could claim no deliveries. The learned court below finds Sussman Bros. vs. Meier, 80 Super. 78, an authority, which we think sustains the decision.

Affirmed.

SELLERS VS. SORBER

Evidence—Contemporaneous Parol Agreement—Assignment—Written Instruments—Inducement—Fraud—Kerr vs. McClure, 266 Pa. 103 Approved

STATEMENT OF FACTS

X owed $500 on a note to Sellers, who was indebted to Sorber to the extent of $350. Sorber insisting on payment, Sellers trans-

ferred the note to him by an assignment written on the back. Sorber has collected the $500. Sellers sues him for $150 and offers to prove that when the assignment of the note was made, it was agreed that, on collecting the note, Sorber should pay Sellers $150. Objection is made to the attempt to modify the written assignment by a simultaneous parol, no fraud, accident, or mistake being shown.

Amdur, for Plaintiff.

Baker, for Defendant.

OPINION OF THE COURT

Dilley, J. There is but one question involved in this case. It is whether an assignment of a note may be modified by parol evidence of an agreement made at the time that the assignment was made. The law on this question in Pennsylvania is very confused. Some cases hold that evidence of this kind is admissable, others that it is not. The better view, however, seems to be that evidence of this kind is admissible. The cases of Walker vs. France, 112 Pa. 203; Greenwalt vs. Kohne, 85 Pa. 375; and Plunkett vs. Roehm, 12 Super. 86, hold that "written instruments, in general, may be varied, explained, or even modified by extraneous evidence, written or oral, where such evidence is a part of or necessary to a proper understanding of the principal agreement." The cases of Noel vs. Kessler, 252 Pa. 250; Excelsior Saving Fund and Loan Co. vs. Fox, 253 Pa. 259; Second National Bank of Reading vs. Yeager, 268 Pa. 167; Danish Pride Milk Products Co. vs. Marcus, 272 Pa. 340; Dixon vs. Minogen, 276 Pa. 565 are authorities for the statement that "when at the execution of a writing, a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, parol evidence is admissible although it may vary and materially change the terms of the contract."

In the case at bar the plaintiff offers evidence to prove an agreement between himself and the defendant by which he was to have $150 returned to him upon the collection of the note which was assigned by him to the defendant. Assignments because of their more or less fixed form do not as a rule mention extraneous agreements leading up to their execution nor is it to be taken that they must necessarily do so. The remote terms upon which an instrument, such as an assignment, is executed are governed in the majority of cases by an oral agreement, circumstances, or commercial usage. Such agreements we think are admissible in evidence to explain, supplement, or modify the principal agreement to show the grounds upon which it was executed.

It is entirely reasonable to assume in the present case that the plaintiff executed the assignment of the note upon the faith of the parol agreement which he claims was entered into between himself and the defendant, since by the terms of the parol agreement he was to have $150 back when the defendant collected the full value of the note. It is not reasonable to assume that the plaintiff would have transferred a note worth $500 in payment of a debt of $350 unless it were under the terms of such an agreement as he seeks to prove. So we have it that it is competent for him to prove by parol evidence the agreement between himself and the defendant under the cases cited above.

The opinion of Mr. Justice Williams in Clinch Valley Coal and Iron Company vs. Willing, 180 Pa. 165 in our mind expresses the settled law on the subject. He says, "The existence of a contemporaneous parol agreement between the parties under the influence of which a note or contract has been signed, which is violated as soon as it has accomplished its purpose in securing the execution of the paper may always be shown when the enforcement of the paper has been attempted. It is plain fraud to secure the execution of an instrument by representations as to the manner in which payment shall be made, differing in important particulars from those contained in the paper, and, after the paper has been signed, attempt to compel literal compliance with its terms, regardless of the contemporaneous agreement without which it would never have been signed at all." This opinion is cited as the existing law in Faux vs. Fitler, 223 Pa. 568.

In view of the foregoing statement of the law it is our opinion that the plaintiff in the case at bar should be allowed to introduce parol evidence of an agreement contemporaneous with his assignment of the note, and we therefore render judgment in favor of the plaintiff.

OPINION OF SUPREME COURT

It is unnecessary to dilate upon this case in view of the very satisfactory opinion of the learned court below. It would be foolish, for either court or legislature to undertake to compel the insertion in a writing, which embodies some agreements between the parties, all agreements made at the same time, even if the omitted agreements bore on the same matter with which the written ones dealt. The cases in which such unwritten agreements have been allowed to be proved are numerous. Wisely says Justice Simpson, in Kerr vs. McClure, 266 Pa. 103, "In a suit based upon a writing, the law will not permit one of the parties to repudiate a prom-

ise by means of which he induced the other party to execute it." The assignment of the $500 note by Sellers enabled him to procure the $500 from X, but it was understood that on collecting it, $150 should be paid to Sellers. There is no reason for refusing to compel Sorber to perform what he orally agreed to do. Affirmed.

ACHISON VS. BALLINGTON

Mines and Mining—Conveyance of Coal—Right of Accession to Conveyed Coal—Use of Surface—266 Pa. 18 Approved

STATEMENT OF FACTS

Ballington sold all the coal in his farm to Achison. The grant conferred the right to erect the necessary apparatus on the surface. It was provided, however, that the occupancy of the surface should cease after five years. Much coal was extracted during five years but not all. Achison continued to maintain the structures and the operations despite objections from Ballington, who thereupon tore down the tipple, etc., and prevented the continuance of the work. This is a bill in equity to restrain defendant from interfering with the operations.

Keil, for Plaintiff.

Mark, for Defendant.

OPINION OF THE COURT

S. Johnson, J. This case resolves itself into the question whether the defendant was justified in tearing down the tipple, etc., thus preventing the plaintiff from the future mining of coal or whether the plaintiff should be allowed to continue the mining on the theory that the deed from Ballington to Achison created an estate in the coal as separate and distinct from the surface which entitles him to right of way by necessity?

The substance of the plaintiff's argument is based on the contention that the stipulation in the grant to the effect that the use of the surface should be confined to a term of five years is void and of no effect inasmuch as it is inconsistent with the grant of a fee simple estate in the coal.

We however view the relation between the plaintiff and the defendant as a contract, the consideration for the plaintiff's promise to pay, being the exclusive right to mine the coal on the defendant's land for a period of five years after which time his right of access from the surface elapses. If the plaintiff wishes to exer-

cise an independent right which is contradictory to a valid and subsisting right in the contract then the whole contract must first be wiped out, Simple vs. R. R. Co., 172 Pa. 369. In this case a railroad company entered in to a contract with a landowner by which, in consideration of a right of way, the company agreed to employ the landowner and pay him a salary as station agent at a station to be built by the landowner on his own land. The railroad company cannot revoke the contract in part by instituted proceedings to condemn the station lot and at the same time retain the right of way which was the main consideration. The contract is entire and must be performed or rescinded as a whole. It is easy to see the analogy of the two cases and that if the plaintiff attempts to wipe out the five year clause the entire contract must fail.

When the plaintiff argues that by the conveyance a separation has been made of the ownership of the surface from the underground minerals and that this precludes the owner of the former from acquiring title to the minerals by the statute of limitations, 1 Wright 427, 5 Super. 124 and 128, we feel that he is evading the issue and the important question still remains undecided—namely, what is to become of the five year clause?

It is clearly evident that the plaintiff contracted away his right of access to the coal after the five years had expired unless he could claim a right of way by necessity, and that necessity must not be created by the party claiming the right of way, McDonald vs. Lindell, 3 Rawle 493. Here the plaintiff clearly realized that he had just five years in which to mine the coal and by overstepping that alloted time the right of way by necessity was created by his own laxity.

In Mahan vs. Clark, 219 Pa. 229, an owner of land sells all the timber thereon and grants to the vendee the right to cut and remove the timber with the "privilege of five years" for the completion of the operation, and the vendee cuts it all down thereby creating personal property.He fails however to remove it before the five year period has expired. It was held that the plaintiff could nevertheless get it as it was now personalty although he was precluded from cutting down anymore. In 15 Pa. 37, 90 Pa. 422, and 28 Pa. 495, this doctrine is reiterated. In these cases the vendee continued to cut down trees after the contracted period had expired and they hold that he can be sued in trespass quare clausum fregit and the vendor can recover for the trees cut in excess of the vendee's right.

The similarity between these timber cases and the case at bar is very apparent. Both timber and coal in their natural state are a

part of the realty, the only difference being that timber is taken from the surface and coal from the underground.

Therefore using the doctrine of the cases just cited as our authority no more coal could be mined by the plaintiff after the five years and the defendant cannot be restrained from interfering with the plaintiff's operations.

Bill dismissed.

OPINION OF SUPREME COURT

The coal, (real property) became the property of Achison. There would have been an implied grant to him of access to it, for the purpose of its extraction and removal, had the parties been silent on that subject. But they were not silent. The matter of access was considered. Occupancy of the surface was conceded to Achison, but with the agreement that it should cease after five years. It is vain to talk of a way by necessity, when the necessity has been pondered by the parties and its exercise, both as to time and in other respects, has been explicitly provided for. Ballington sold the right to occupy his surface for the removal of the coal, during five years, at the expiration of which period, it was to cease. That period has elapsed. Ballington has the right to tear down the tipple, and to prevent other uses of his surface by Achison. The coal continues to belong to Achison but he must discover another way of reaching it. He may get access to it below the surface from adjacent land belonging to him. Or he may buy a right of way from the present owner or his successor. But, ownership of the coal does not ipso facto give the right to use the surface, after the expiration of the right stipulated for, by the running of the five years. A case involving the questions here presented is Greek vs. Wylie, 266 Pa. 18. There are no seriously disputable questions in the case.

The judgment is affirmed.

HODKINS VS. X INSURANCE CO.

Attorney Employed by Several Parties for Services in Similar Suits—Nature of Liability, Joint or Several, for Compensation—Evidence—Value of Offer of Compromise as Evidence—Attorney's Testimony—Evidence of Amount Received in Other Cases

STATEMENT OF FACTS

Plaintiff, an attorney, was employed by the defendant and two other insurance companies, which had become liable to the owner of insured property as consequence of a fire. The companies agreed

to employ the same attorney, but each negotiated separately with their attorney, the plaintiff. The defence was that the insured had set fire to his building. The verdict was for two of the companies in the respective actions by the owner, but in the third, although the evidence was substantially the same, the verdict was for the owner, $3000. This company objected to the bill of the plaintiff. Hence this suit. The defendant's offer to show what the charges against the other two companies had been, was rejected. During the negotiations for fee, Hodgkins had offered to take $500. He now offered evidence that his services were worth $1000. The court told the jury that it could take the $500 offer as evidence of the value of the plaintiff's services only if it was **not made** in an attempt to compromise. That it was thus made there was some evidence.

Bernstein, for Plaintiff.

H. Cohen, for Defendant.

OPINION OF THE COURT

Miss Ainey, J. Three insurance companies agreed to employ one attorney, the plaintiff below. Each company negotiated separately with the plaintiff. Two recovered judgments in prior actions, but the third, the defendant in this suit, lost. The attorney recovered $1000 fees, and the defendant appeals assigning as error: (1) That the liability of the insurance companies, being joint, the action should have been brought against all three; (2) That evidence as to what the charges of the plaintiff were in the suits against the other two companies should have been admitted; (3) That the charges are unreasonable.

There are no facts in the case under discussion to bear out the theory of joint liability. The agreement between the companies was a mere agreement to employ the same attorney; they negotiated separately with the attorney; they carried on separate suits with the plaintiff as counsel; the paid independent counsel fees. Hindman vs. Pittsburgh Trust Co., 266 Pa. 204 which holds, upon an almost identical state of facts, that "a single undertaking for the performance of several duties is in its nature divisible, and especially so in employing counsel" is a satisfactory disposition of this point, refuted by no adequate authority on behalf of the defendant, whose cases do not show joint liability, but merely that where liability is joint, the remedy should be joint; Crepeau vs. Beauchese, 6 C. J. 732, note 84 is quoted by the defendant as stating, "When an attorney is employed by several persons their liability is joint." But immediately there follows (not quoted by the defendant) "But the mere fact that several parties similarly interested employ the same parties does not fix their liability as joint. It must be made to appear clearly

that the contract of employment was joint on the part of the defendant and not several." In Adriatic Fire Ins. Co. vs. Treadwell, is was held that even "an agreement among several insurance companies to employ counsel and unite in defending certain actions and to contribute to pay the expenses pro rata does not import a joint promise of compensation from the companies to the counsel employed nor make them jointly liable to him for his charges for defending such actions."

The facts of the case in question are even further away from implication of joint responsibility, for there was no agreement in anything but the bare fact that they would have the same counsel.

The other two contentions of the defendant should be considered together; the unreasonableness of the amount recovered and the rejection of evidence of the amount paid to the plaintiff by the other two companies. There being no occasion to consider this latter amount as a proportionate share of a total sum due by all three companies of the plaintiff, we think the court properly excluded it. It would be evidence of specific fees in a specific case, and incompetent under the general rule of evidence against providing by specific instance.

Moreover the fee of one attorney in a suit is incompetent to show the value of the services of the opposing attorney, Babbit vs. Bumpus, 73 Mich. 331. If the value of the work of another attorney in the identical case is not a standard of measurement, it is difficult to see how the value of work in any other specific case could be a fair basis. Decision upon such a basis would entail endless controversy over relative amounts of work and degrees of particularity with which it had to be done, with the result of complication of the issues, which it is the policy of the courts to avoid.

The defendant objects to the admission in evidence of the plaintiff's own valuation of his services. This question was not brought before this court on assignment of error, but we will undertake to answer it. "In a suit for attorney's fees an attorney is a competent witness in his own behalf as to the value of his services and is entitled to show his knowledge and experience, and give his judgment as to their value," Babbit vs. Bumpus, 73 Mich. 331. Since the lower court had before it all the evidence which was properly admissible and none which was not, and the error, if any, in the amount of the judgment is that of the jury in its findings upon the evidence, we are indisposed to presume upon our power to reconsider the question of value, especially as the defendant might have shown by expert testimony of other attorney's practicing at the same bar, what a reasonable charge for the services in cases similar to the

one in question would be. This, while not conclusive would have been a proper basis of estimate.

The assignments of error are overruled and judgment affirmed.

OPINION OF SUPREME COURT

The three Insurance Companies agreed to make a similar defence, viz., that the plaintiff had set fire to the building, and they found it convenient to employ the same attorney, Hodgkins. They employed him, but not jointly. Each alone negotiated with him. There was no contract between him and the three companies, but a separate, though similar contract between each of them and him.

In the separate suits against two of the companies ,they had been successful in establishing the defence. But it would not follow that the third company, the defendant, must also be successful. Possibly the witnesses did not as clearly swear to the facts, making the defence; possibly one or more of them had been bribed to deviate from their former testimony; possibly the complexions of the minds of the third jury were so different from those of the first two juries that the same evidence led them to an opposite result. That there was a difference between the verdict was not miraculous.

But what concerns us here, is the compensation to which the plaintiff is entitled, from the defendant. For possibly similar work, he charged and obtained a fee of less than he is now claiming. But was it similar? It could be difficult to show the exact quality and quantity of the work done, in the three cases, so as to enable the jury to say that they were the same. The results were different, possibly because of greater industry or skill displayed in the third trial. The effort of the attorney is one measure of the meritoriousness of his service, but the success of it, the gain or saving to the client is another. It was proper to consider the work done in the present case, and to apportion the fee by it, without undertaking to consider the work done in other suits and the compensation paid therefore, Hindeman vs. Pittsburgh Trust Co., 266 Pa. 204.

In order to induce payment without suit the plaintiff offered to accept $500, instead of $1000. This offer would not assist in measuring the fee to which the plaintiff was entitled. In seeking a compromise a man's offer may well be to accept less than he believes to be due him. The purpose of the offer failing of accomplishment, it is **functus officio.** It was not made to state what was due the plaintiff; but what he would accept rather than litigate, 266 Pa. 204, Supra.

It does not appear that the plaintiff's testimony to the value of his services was received, but, as the learned court below says, such

testimony would have been admissible. The plaintiff is an expert; he knows the quantity and kind of work done by him. Although he testifies under a bias that does not forbid the reception of his opinion.

The judgment of the learned court below is affirmed.

ADAMS VS. HOLSTER

Trusts—Trust by Mother For Children and Herself—Following Trust Fund—Husband's Right of Courtesy in Trust on Death of Mother—Presumption of Trust

STATEMENT OF FACTS

John Holster, a fireman, was killed while doing his duty at a conflagration. His family being destitute, consisting of a wife and three children, a fund was collected for their benefit, amounting to three thousand dollars. This sum was given to Mrs. Holster for herself and her children. She purchased a home with it, later selling the home for $3,600. She then invested that sum in another house. The conveyance was made to her as grantee in fee simple. After the purchase of the second house, she married Adams. Adams claims curtesy, his wife dying in 1915. He brings ejectment for possession of the entire house. The court held that he was entitled to an undivided fourth of the house for his lifetime. Adams appeals.

Beckley, for Plaintiff.

Bernstein, for Defendant.

OPINION OF THE COURT

Bobick, J. Before deciding whether Adams is entitled to the possession of the entire house during his lifetime, or only to a fractional portion thereof, it is necessary for us to ascertain the quantum of the wife's estate at the time of her death. To determine this we must review the facts leading up to the creation of the estate.

The original fund was contributed by the people of the community and was given to Mrs. Holster for herself and her children. The desperate circumstances of the family and the condition under which the husband was killed clearly indicate that the fund was intended as a gift for the wife and the children. There was no stipulation as to what portion each of the donees was to take. The presumption is therefore that they took in equal proportions,

the wife taking a fourth and the children each a fourth, Frazer vs. Foreman, 269 Pa. 13; Loring vs. Palmer, 118 U. S. 321.

Mrs. Holster then invested this sum in the purchase of the first house. Subsequently she sold this house and for the proceeds $3,600, purchased another house. The second conveyance was made to her as grantee in fee simple. That three-fourths of the purchase price was the money of the children is absolutely certain. Under these circumstances a resulting trust in three-fourths of the property was created in favor of the children. Mrs. Holster held the legal title to the entire house and absolute title, free of equities, in one-fourth of the house only, Frazer vs. Foreman, 269 Pa. 13; Edwards vs. Edwards, 39 Pa. 369.

It is a well settled principle of law however, that a mere naked seisin by the wife, where the beneficial interest is in another will not support a tenency by curtesy. This is so even though the wife has a beneficial interest in the reversion. Chew vs. Commissioners of Southwark, 5 Rawle 160; McKee vs. Jones, 6 Pa. 425. Consequently only one-fourth of the property was subject to the husband's right of courtesy, and he is entitled to a life estate in such portion only, Lancaster Co. Bank vs. Staufer, 10 Pa. 398.

Having decided that the wife at her death had absolute title to only one-fourth of the house in question, we will proceed to dispose of the appellants assignments of error. (1) The appellant contends that the wife being grantee in fee simple, he is entitled to the right of courtesy under the Intestate Act of 1833, P. L. 316. He also contends that this act allows him at least an undivided one-third of his wife's estate as his share.

We cannot affirm this point. The Intestate Act of 1833, provides as follows: "Where an intestate shall leave a husband surviving, he shall take the whole of the personal estate, and the real estate shall descend as hereinafter provided, saving to the husband his right of courtesy, which shall take place although there be no birth of issue." The husband under this act is entitled to his common law right of courtesy in the wife's estate of inheritance. The wife's estate in this case being one-fourth of the whole, if follows, that the husband is entitled to a life estate in such portion only.

(2) The second assignment of error is that the trust cannot be sustained as to the property purchased by the widow, because this purchase had been made over five years before this action was brought and not having been acknowledged in writing is barred by Section 6 of the Act of 1856, P. L. 533. As that question was not raised in the court below it is not properly before us and it

is not necessary to consider the case from that standpoint.

(3) Appellant also contends, that even if a trust had been created, the wife's dealings with the property were of such nature as to destroy the force of the trust. In support of this argument counsel for the appellant cites the following from Reed vs. Miller, 122 Pa. 635; "If a trustee buys land with trust funds which he has no right to use in that way, or if he takes the conveyance in his own name instead of the name of the trust fund, title does not vest in the cestui que trust by mere operation of law, but the trustee may sell the same for good consideration." We concede this to be the existing law. The trust however is not destroyed. The trustee becomes liable for the proceeds of the sale. The court in the above mentioned case in the same paragraph continues as follows: "It is not the fact of purchase by the trustee fraudulently, but the fact of election of the cestui que trust that gives him title. His right is to have the money unless he is willing to have the land instead." It is obvious that the children in the case at bar had elected to take the realty.

(4) Appellant's contention that the taking of the legal title in the name of the widow indicated incidentally, that the money belonged to her, is also unavailing. The money was given to her, for herself and the children. In Frazer vs. Foreman, 269 Pa. 13, where a situation identical to this arose the court construed the transference of the money as a gift and the donee, as taking per capita.

The authorities cited by counsel on both sides have been examined and considered. We do not feel that any useful purpose would be served by mentioning others than those already referred to. The judgment of the lower court is affirmed.

OPINION OF SUPREME COURT

The conclusion reached by the learned court below must be ratified.

The fund was collected and given for the wife and the children of the deceased fireman. When it was invested in a house, the house became the property of those to whom belonged the fund. The second house belonged to the same persons. From the fact that the deed for it was made to Mrs. Holster alone, she and the children living together, cannot be inferred that she was asserting a sole ownership of the house. As there was no indication of purpose on her part, to deny co-ownership of the children, the lapse of time, since the conveyance of the second house is not important.

As Mrs. Holster was not claiming adversely to the children, Mr. Adams could not change the quality of her claim, during her life time. She holding the legal title charged with the trust as to three-fourth, in favor of the children, his courtesy could attach only to her equitable and legal one-fourth. He has recovered one-fourth of the house, and is entitled to no more.

Judgment of the learned court below is affirmed.

COMMONWEALTH VS. COOLIDGE

Criminal Law—Murder—Twice in Jeopardy—Constitution of Pennsylvania, Art. 1, Sec. 10 Discussed—Illness of Juror—Effect of Discharge of Jury.

STATEMENT OF FACTS

Murder, plea of former jeopardy. A jury had been selected to try defendant and the reception of evidence had lasted a day, when a juror became ill. For a time he was unconscious. Physicians called in said he would no longer be able to serve, and a protracted sickness would probably follow. The next morning the court discharged the jury, and another was called. The court sustained a demurrer to the plea of former jeopardy. Appeal.

Geistwhite, for Plaintiff.

Gottleib, for Defendant.

OPINION OF THE COURT

Beckley, J. From the facts of this case it appears that a juror became sick and thereby unable to further serve in this capacity. The jury in the course of events was discharged and a new jury drawn. From this occurrence it further appears that the defendant claims former jeopardy and is therefore entitled to an acquittal.

Cases frequently arise in which a jury finds great difficulty in agreeing. This presents the possibility of hardship and inconvenience to the jurors. To contend that these hardships and inconvenience are to be overlooked in administering justice would be to defeat the very ends of justice. This would be maintaining undue consideration for the accused and incidentally would not harmonize with the true construction of the word justice. Certainly it is to be conceded that all due rights should not be severed from the defendant. However, would the discharge of a jury in the

case of absolute necessity be working such hardship upon the accused as contended? Would it be severing some of his legislative rights from him? It is our opinion that even in this case, a capital one, the balance of convenience should be considered and hence determined upon whom the greater injustice would be done. Is it not fair to presume that if a juror, in ill health, were forced to continue in the performance of his duty, he and his fellow jurors might be prey to all sorts of injustice? This would indeed controvert the application of true justice in our courts.

The defendant contends that "The law is fundamentally liberty and justice." By this statement he defeats his own claim. Surely it is to be readily perceived that this is in accord with the argument of the Commonwealth. It is difficult for the court to see where any injustice or hardship has been committed against the defendant, whereas we can visualize the difficulties which would present themselves in administering justice, if courts of law were hampered in this discretionary right of discharging juries.

The cases though few in number, in support of this argument are clear cut and decisive in their views. The early reported case of Commonwealth vs. Cook, 6 S. & R. 577, clearly illustrates the natural tendencies in this respect. The latest reported case upon this subject in Pennsylvania, Commonwealth vs. Davis, 266 Pa. 245, shows no divergence of opinion from the early cited cases. All cases seem to emphasize the fact that, where the occasion necessitates the discharge of a jury and where the court rightfully does so, no injustice has been done the accused.

The purpose of the statutes is to further the means of justice and not to act as a bar to the promotion of it. It is the opinion of this court that the defendant's contention of former jeopardy is unfounded and must fall for want of proper support. Therefore, we, the court, render judgment for the Commonwealth.

OPINION OF SUPREME COURT

"No person" says the Constitution of Pennsylvania, "shall for the same offense, be twice put in jeopardy of life or limb." Art. 1, Sect. 10.

A man is not in jeopardy of life or limb, unless the crime, with which he is accused, is a capital one. If he may, as a punishment, forfeit his life, exposure of him to more than one jeopardy is thus prevented.

When is the person accused of a capital crime in jeopardy? Not when he commits it; not when an information is made against him; not when he is arrested; not when he is indicted;

not when he is bailed into court for purpose of trial. The selection of jurors to try him may actually be begun; may indeed be advanced to completion; and yet the constitutional jeopardy has not commenced, McFadden vs. Commonwealth, 23 Pa. 12; Alexander vs. Commonwealth, 105 Pa. 1.

But, as soon as the jury is fully selected and sworn, the jeopardy has begun, although no evidence has been offered and therefore, a conviction is not yet possible, Hilands vs. Commonwealth, 111 Pa. 1.

Despite the peremptory language of the Constitution forbidding double jeopardy, recognition of exceptions has been forced on the courts. Events may happen, after the swearing in of the jurors, which make trial impossible. The judge may die, or become too ill to remain in charge of the trial. A juror (one of the twelve) may die or become gravely ill, or insane, so that his further participation in the investigation may be impossible. The accused has been once in jeopardy. May he be compelled to submit to another trial before another judge and jury?

Here enters the question of the sufficiency of the occasion for arresting the first trial. If it was discontinued without proper cause, a second trial will not be permissible, and the accused though guilty of murder, will be immune from punishment, Commonwealth vs. Clue, 3 R. 498; Commonwealth vs. Cook, 6 S. & R 577.

But, the severe illness of a juror, which incapacitates him from doing his duty as such, is an excuse for discharging the jury, and for repeating the jeopardy of the accused, by placing him on trial before another jury. Despite the injunction against putting him twice in jeopardy, his second jeopardy is justified because of the impossibility of completing the trial by the first jury. The Constitutional principle is then softened down to the statement that a man cannot be put on trial before a second jury, unless the deliberation of the first jury was checked by occurrences justifying or requiring the premature termination of the first trial.

Here, a juror became unconscious. Experts expressed to the court the opinion that he could no longer serve, and that a protracted sickness probably would result, if the juror were not discharged. Such evidence is addressed to trial judge. If he is convinced by it, and the appellate court thinks his decision of the necessity to discharge, warranted, the court will say that the accused has not by the second trial been "twice in jeopardy of life or limb," although he plainly has been. That is a shorter way of saying, though he has been in jeopardy, the first trial has end-

ed unavoidably, without deliberation and verdict, and a second jeopardy is warranted. If those who invented the Constitutional phrase, had adequately exercised their imaginations, they, probably would have said that the selection and swearing of one jury, should count for a first jeopardy only if circumstances did not intervene, rendering the normal termination of the trial impossible, Commonwealth vs. Davis, 266 Pa. 245.

We think the learned court below has reached a sound decision. Affirmed.